

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 169 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and  
MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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MAHMADKHAN RASULKHAN PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MR MJ BUDDHBHATTI for Petitioner  
MR SA PANDYA, LD. APP for Respondent No. 1  
MR SUNIL C PATEL Addl. Standing Counsel for Central  
Government - Informed and heard.

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CORAM : MR.JUSTICE K.R.VYAS and  
MR.JUSTICE M.S.PARIKH  
Date of decision: 22/12/97

ORAL JUDGEMENT (Per M.S.Parikh, J.)

1. The appellant Mohmadkhan (Mahmudkhan) Rasulkhan Pathan has brought under challenge his conviction u/S. 20(b)(1) of the Narcotic Drugs and Psychotropic

Substances Act, 1985 (for short 'NDPS Act') and section 66(1)(b) of the Bombay Prohibition Act, 1959 and his sentence of rigorous imprisonment for a period of ten years and fine in the sum of Rs.1,00,000/-, in default to undergo rigorous imprisonment for one year rendered by the learned Additional City Sessions Judge, by his impugned judgment and order dated 4/1/1991 in Sessions Case No. 25 of 1990.

2. It is the prosecution case that pursuant to secret information received by the complainant Mr. A.S. Saiyed, Inspector, Customs (Preventive), Ahmedabad on 22/8/1989 the proceedings were undertaken. Mr. Saiyed reduced the information into writing, placed it in a sealed cover and delivered the same to the Superintendent of Customs Mr. P.D. Nair. Both of them then went to the Assistant Collector (Preventive) Mr. Thakur and handed-over the sealed cover to him. According to Mr. Saiyed one D.R.I. form (I) was also filled in which was scrutinised by the Assistant Collector. Two Custom Inspectors Mr. Batham and Mr. Barot were thereafter called. The matter was discussed amongst all the aforesaid officers and a raid was arranged. Mr. Saiyed went outside the office for calling Panchas, after whose arrival necessary particulars with regard to names and addresses of the Panchas were recorded and primary panchnama was prepared. Thereafter the raiding party consisting of Superintendent Mr. Nair, Custom Inspectors Mr. Saiyed, and Mr. Barot alongwith the Panchas left the Custom House in the Government car, Mr. Batham following the car on his motor cycle. They accordingly reached Isanpur Four Roads around 12.45 p.m. on the same day, namely 22/8/1989. The appellant, referred to herein as the accused, was ultimately found standing alongwith a tin container as per the secret information received by the concerned inspector. Custom Inspector Mr. Saiyed in the company of the two panchas initially went to the place where the accused was standing with the container and upon inquiry having been made by Mr. Saiyed regarding contents of the tin container, the accused informed Mr. Saiyed that it contained household articles. In the meantime the Custom Superintendent Mr. Nair and other officials reached the place. Mr. Nair disclosed his identity and also that of the members of the raiding party to the accused. Upon being asked, the accused informed that he was Mohammadkhan Rasulkhan Pathan by name and upon being asked about the contents in the tin container, he stated that it was belonging to him and it contained 16 Kgs. of 'Charas'. It was the prosecution case that on account of rain showers Mr. Nair informed Panchas that it would not be convenient to

prepare panchnama at that place. One more reason for doing so was that people were gathering at the place. The Panchas having agreed to leave the place for the Custom House they proceeded for going to Custom House accordingly. The container was placed in the dickey of motor car which was then locked. They accordingly in the company of the accused reached the Customs House, where they opened the dickey and the container was taken out in the presence of the Panchas and the accused. They all then went to the Customs House more particularly in the C.I.U. room where the tin container was placed on one table. At that time over and above the persons of the raiding party Mr. Thakur, Assistant Collector of Customs, Mr. Joshi, Inspector and other 2 to 3 officers of the Customs Department were present. Thereafter in the presence of the Panchas the container was opened. One gunny bag was taken out from the container. It was tied with red plastic string. It contained the inscription reading "909 Basmati Rice". The gunny bag was then opened and four plastic transparent bags were found therefrom, three bags were weighing 5 Kgs. each and 4th bag was weighing 1 Kg. of material. A detailed Panchnama was prepared in the presence of accused and Panchas and other officers. The samples then were taken from the material. The samples were drawn of 150 Grms. in three parts and 50 Grms. of material taken out from each of the parts was placed into covers prepared for that purpose from cloth and paper. Labels were affixed on the covers and signatures of the Panchas were taken. All the three covers were accordingly sealed and then remaining material was put back in the aforesaid 4 plastic bags, which were again placed back into the gunny bag which was tied with aforesaid plastic string and that gunny bag was once again placed into the tin container which was sealed in the presence of the accused and Panchas. A detailed Panchnama came to be prepared in presence of the accused and Panchas and other officers of the Customs Department.

3. It is the prosecution case that on the same day i.e. on 22/8/1989 the statement of the accused was recorded. However, the accused absconded from the surveillance of the Customs Department resulting in a complaint being filed in the Navrangpura Police Station. Ultimately the concerned Custom Officer received the information about the accused staying in one mosque situated in village Chekhla. Upon receipt of such information Inspector of Customs Mr. Saiyed, in the company of other members of the staff went at the place where he found the accused coming out of the mosque. The accused was picked up therefrom and brought to the

Customs House and his second statement was recorded. Thereafter, on 24/9/1989 the accused was arrested at about 3.00 p.m. and he was produced before the learned Chief Judicial Magistrate, Ahmedabad. The accused was then taken into the judicial custody.

4. It has also been the case of the prosecution that a complaint was lodged by the Superintendent of Customs, Mr. M.A. Shah as per exh. 52 before the learned Chief Judicial Magistrate, who initially registered the complaint, issued non-bailable warrant for the offence punishable u/S. 20(b)(ii) of the NDPS Act and allowed the Muddamal to be kept with the Department. By his order dated 21/12/1989 the learned Chief Judicial Magistrate committed the case as the Sessions Case. The learned City Sessions Judge vide his order dated 12/2/1989 has framed the charge against the accused under the aforesaid provisions of the NDPS Act and Bombay Prohibition Act. The accused having pleaded not guilty to the charge claimed to be tried and the matter accordingly went for trial before the learned Additional City Sessions Judge, who after recording evidence, after recording statement of the accused u/S. 313 of the Code of Criminal Procedure, 1973 and after hearing the learned counsels appearing for the rival sides, passed impugned judgment and order. The appellant has, therefore, been before this Court as aforesaid.

5. We have heard Mr. Budhbhatti, learned advocate appearing for the appellant and Mr. S.A. Pandya, Ld. A.P.P. and Mr. Sunil C. Patel, Ld. Addl. Standing Counsel for the respondents. Mr. Budhbhatti had taken us to the evidence adduced before the learned Additional Sessions Judge. He read before us necessary documents which include the D.I.R. Report, the complaint, the Panchnama, the report of the analyst from Forensic Science Laboratory and the statements of the accused.

6. Mr. Budhbhatti has submitted that the prosecution story as it stands is inherently improbable, as according to his submission it would be improbable that a person would be waiting at a particular place and found also present as per such information at that place, raided there and there and having escaped once again found out. We might at once make a note of the fact that the secret information recorded and noted in the D.I.R. -I Form (exh.6) would indicate the facts revolving round the initial stage in the case. The information was to the effect that one person named Mohammadkhan Rasulkhan Pathan, residing near Saiyed Vadi, Vatva, Ahmedabad was

likely to come at about 13-00 to 14-00 hours on that day (22/8/1989) from Vatva side at the place near Isanpur Four Roads, Ahmedabad with 15 to 20 Kgs. of Charas (narcotic drug) in a medium size tin container. This information, first in point of time came to be recorded as per the procedure in D.I.R. I Form and the evidence clearly indicates that necessary procedure was followed in transmitting and following the information. It is not that all of a sudden the officers appeared at the spot and carried out the operation. The facts as they appear in the evidence clearly indicate that the initial part of the prosecution case is noted in the relevant documents. Necessary action of calling the Panchas had been taken at the Custom House and thereafter the members of the raiding party, who all were the Gazetted officers and the Panchas had gone to the place where the accused was to arrive and wait. The prosecution story has been supported by a number of documents which include the D.I.R. Form I, the Panchnama with other documents witnessing the action taken by the Custom Department. It is not that the incident has taken place all of a sudden so that it could be argued that the prosecution story is inherently improbable. Prosecution case consist of number of stages which have been followed one after the other as they happened. Hence, we are not in a position to accept the argument that the prosecution story is so inherently improbable that it cannot be voiced into the accused's conviction and sentence.

7. Next submission of Mr. Budhbhatti is that the conviction and sentence came to be based upon the evidence of interested witnesses. According to his submission the concerned officers of the Custom Department could have arranged presence of independent persons from the place where the accused was apprehended, namely Isanpur Char Rasta. He submitted that it was in the after-noon that the incident in question had taken place and, therefore, quite a sizeable number of persons would have been available to the officers of the Customs. He then submitted that when the Panchas who had been secured from near the Customs House, though independent witnesses, were not examined and, therefore, corroboration in the form of Panchnama, if any, would stand weakened. It is not a rule of law that in all cases and under all circumstances when a raid is carried out or when a person is apprehended, the concerned officer should go in search of some well known persons from nearby place. In a matter like the present where there is some immediate information received the concerned officers were required to act fast for the purpose of finding out the truth of the information. It

would, therefore, be natural for them to make immediate arrangement of Panchas to accompany the officers to go to the place. There would hardly be any time left at the place of incident for making any arrangement for other independent persons. Once-again it is not a rule of law that Panchas in all cases have to be examined when the officers such as Custom Officers were present and in whose presence the Panchnama was recorded and who have been examined in the case. In the trial before the learned Additional Sessions Judge one Abrarhussain Saukathussain Saiyed, the Custom Inspector, Ahmedabad was examined as P.W. No. 1 at exh. 5, one Akhilkumar Bahilalbhai Barot working as Custom Inspector (Preventive) at the relevant time was examined at exh. 18 as P.W. No. 2. Both the witnesses were respectively concerned with the secret information which was received and consequent search and other relevant work undertaken. Mr. Akhilkumar had also written the Panchnama. P.W. No. 3 Madhusudan Manilal Joshi exh. 21 working as the Custom Inspector (Preventive) had taken active part in preparing the Panchnama. Therefore, when all the aforesaid officers who were present at the relevant point of time had been examined and cross-examined at length, it could hardly be said that presence of Panch persons before the Court would have made any difference in the ultimate conclusion. One Ushaben Indubhai Pujara, P.W. no.4 serving as Senior Scientist in Forensic Science Laboratory, Ahmedabad, who had made physical and chemical analysis of the substance in question has been examined at exh. 23. One Girdharlal Mohanlal P.W. No. 5 working as Godown Superintendent Incharge, Customs Department, Ahmedabad who had kept the Muddamal in his custody has been examined at exh. 32, who was also examined for the purpose of stating before the Court that during the trial the Muddamal was destroyed after following the necessary procedure. One Rajnikantaben Narendra P.W. No. 6, who was working as Senior Scientific Assistant of Forensic Science Laboratory, Ahmedabad has been examined before the Court. She deposed with regard to botanical examination of the Muddamal substance in question carried out by her. Mr. Pravin Parshotambhai Mewada, who was the Executive Magistrate, Ahmedabad city at the relevant point of time has been examined as P.W. No. 7 at exh. 39 in respect of photogrpah of Muddamal article no.4 and the photograph of inside substance of Muddamal article no.4 having been taken on 4/10/1989 in his presence and Panchnama in that respect having been prepared in his presence. One Prabhakaran Damodaran P.W. No.8, who was working as Superintendent of Customs, Head Quarter office, has been examined at exh. 40 in respect of the initial part of

the prosecution case. Mr. Ramji Pitamber Kanjaria P.W. No. 9 serving in the Preventive section of the Customs Department at the relevant time, who had written on 22/8/1989 the statement of the accused, exh. 41, has been examined at exh.46. One Natvarlal Kalyanbhai examined at exh. 47 was working as Superintendent of Customs C.I.E.U. Unit and in the presence of this witness the accused has given his statement exh. 48 which was written by Mr. Aiyer, (Mr. Yagnishwaram Ramaswami Aiyer) who was examined at exh. 49. He has deposed to the fact about he having written the statement of accused at exh. 48 in presence of Mr. Natvarlal. The complainant Mr. Mahendra Ambalal, the Superintendent of Customs (Preventive) has been examined as P.W. No. 12 at exh. 51 and his complaint is placed at exh. 52. The prosecution has also placed on record the Muddamal articles with three lists exhs. 11, 13 and 17.

8. As against the prosecution evidence which in all material respects set out and support the prosecution case, the accused came out with a defence of total denial. It might be noted that it was never the case of the accused that some one planted the offending substance. In the background of such a state of prosecution case, prosecution evidence and the defence the submission that absence of Panch witnesses before the Court and or absence of independent witnesses having been procured by the Customs Department at the site would vitiate the trial or would adversely affect the conviction and sentence against the accused cannot be accepted. In the facts of the case we are unable to accept the submission of Mr. Budhbhatti in this respect.

9. Mr. Budhbhatti then relied upon an unreported decision of this Court in Lalluram Rambax Chaudhary v/s. State of Gujarat in Criminal Appeal No. 675 of 1989 (Coram : A.N. Divecha, as he then was and H.R. Shelat, JJ.) (Per Divecha, J.) rendered on 13/12/1995 and submitted that in the present case there is non-compliance with section 102(3) of the Code of Criminal Procedure, 1973 and therefore, the impugned judgment and order of conviction and sentence cannot be sustained in law. Mr. Budhbhatti relied upon para. 3, 4 and 5 of the judgment, which would read as under :-

"This appeal can be disposed of on a short ground based on sec. 102(3) of the Code of Criminal Procedure, 1973 (the Cr.P.C. for brief). It may be mentioned that sec. 51 of the NDPS Act makes the relevant provisions contained in the NDPS Act

applicable to the extent they are not inconsistent with the provisions of the NDPS Act.

Section 52(3) of the NDPS Act requires forwarding of the arrested person and the seized article inter alia to the officer in charge of the nearest police station. Sub-section (4) thereof requires the authority or officer to whom any person or article is forwarded inter alia under sub section (3) to take such measures as may be necessary for the disposal according to law of such person or article. There is no provision in the NDPS Act inconsistent with sec. 102(3) of the Cr.P.C. It is needless to repeat or to reiterate that, by virtue of sec. 51 of the NDPS Act, the provisions of the Cr. P.C. to the extent they are not inconsistent with the provisions contained in the NDPS Act would be applicable including to all arrests and seizures made thereunder. Section 102(3) of the Cr.P.C. inter alia requires a police officer seizing any property forthwith to report the seizure to the magistrate having jurisdiction.

4. It appears that the complainant inter alia carried the seized article to the Town Police Station at Himatnagar. In view of the aforesaid provision contained in sec. 102 (3) of the Cr.P.C. read with sec. 52(4) and sec. 51 of the NDPS Act, the police officer in charge of the town police station was supposed to report the matter to the learned Chief Judicial Magistrate at Himatnagar. It appears that the aforesaid statutory provision contained in sec. 102(3) of the Cr.P.C. has not at all been complied with in the present case.

5. Rival submissions were urged before us whether the aforesaid statutory provision contained in sec. 102(3) of the Cr. P.C. was directory or mandatory. We do not propose to address ourselves on this question. Even if it is assumed to be directory, according to well-settled principles of law, its substantial compliance would be necessary. Non-compliance therewith would certainly be fatal to the prosecution and such non-compliance would vitiate the trial itself."

10. It might be noted from the facts set out by the Bench in the aforesaid unreported decision that one



additional Police Sub-Inspector of the Town Police Station at Himatnagar, while taking round on 23/7/1987 had an occasion to go to the S.T. Depot at Himatnagar, accompanied with certain police officials. He found the accused with a bag in his hand which the accused was trying to hide on seeing the said police officers. The police officers thereupon becoming suspicious about the behaviour of the accused, summoned two panch witnesses. The bag from the hands of the accused was recovered and opened and some blackish substance was found therefrom. The substance ultimately appeared to be opium. It is in the context of such facts concerning police officers that this Court was required to deal with the provisions of section 102 (3) of the Code of Criminal Procedure. In the present case such is not the position. Section 52(3) of the NDPS Act says that every person arrested and article seized shall be forwarded without unnecessary delay to the officers stated in clause (a) or (b) thereof and clause (b) thereof refers to sec. 53 which in term speaks about officers of certain departments which include excise /custom departments. Section 52-A introduced with effect from 29/5/1989 deals with disposal of seized narcotic drugs or psychotropic substances. The concerned Custom Officials in this case, upon having some secret information had to undergo the arrangement of raiding and apprehending the accused in possession of around 16 Kgs. of Charas as per the detailed facts noted hereinabove. The procedure that has been followed by the concerned Custom Officers is one under the provisions of the NDPS Act. Besides, the appellant-accused had soon absconded. In that view of the matter the aforesaid decision on which Mr. Budhbhatti has placed reliance can hardly have any application here.

11. Mr. Budhbhatti's final submission revolves round the requirements of law as contained in section 50 of the NDPS Act. It is his submission that said requirements have not been followed by the concerned officials. It is his further submission that the requirements as contained in section 50 of the NDPS Act have been held to be mandatory. He has placed reliance upon a decision of the Supreme Court in the case of State of Punjab v/s. Balbir Singh reported in AIR 1994 SC 1892. He read before us what has been said by the Apex Court in para. 17 and 26 of the citation. For the purpose of appreciating the submission of Mr. Budhbhatti section 50, more particularly section 50(1) of the NDPS Act might be reproduced :-

"50. Conditions under which search of persons shall be conducted.- (1) When any officer duly

authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

Mr. Budhbhatti submitted that words "if such person so requires" would indicate that it would be obligatory on the part of the concerned officer to inform the person to be searched that if he so requires, he would be produced before the Gazetted Officer or the Magistrate and thereafter a search will be conducted. The Apex Court has observed that a valuable right has been given to the person to be searched in the presence of the Gazetted Officer or Magistrate, if he so requires, since such a search would impart much more authenticity and credit-worthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. It was accordingly held that the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right. Reference to sec. 50 has been made in the context of the provisions contained in sections 41 and 42 of the NDPS Act. In that regard the Apex Court has drawn following conclusions :-

"(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into

an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

- (2A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorised officers enumerated in Ss. 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.

- (2B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

- (2C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between

sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr. P.C. fails to strictly comply with the provisions of sections 100 and 165, Cr. P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr. P.C., namely Sections 100 and 165, Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. , then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information, the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a

gazetted officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

- (6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

It might be noted from the aforesaid decision that the scheme of the Act as contained in sections 41 and 42 has been considered by the Apex Court. However, what would happen when the concerned officer happened to be a Gazetted officer and when the accused was posted with the information that the concerned officer happened to be a high ranking officer came to be considered by a Division Bench of this Court when the aforesaid decision in the case of Balbir Singh was canvassed in support of the exactly similar submission which we are required to consider here also. That was in the case of D.B. Thakur v. State reported in 37-1 (1996-1) G.L.R. 219. Suffice it to reproduce what the Division Bench has said in paras. 19, 26 and 29 of the citation. The same need be reproduced :-

- "19. Keeping this in mind, it is to be considered whether there is any substance in the contention of Mr. Keshwani that there is non-compliance of a mandatory provision of sec. 50(1) of NDPS Act. Mr. Keshwani has contended that not only the officer has not taken down the information in writing, but has not asked the accused as to whether they would like to be searched in presence of the Gazetted officer or the Magistrate. Section 50 contemplates and imposes an obligation on the officers duly

authorised under sec. 42 to tell the accused person whether he would like to be searched in presence of gazetted officer of the department mentioned in sec. 42 or the magistrate. As discussed above, officers referred to in sec. 41 and 42 are different officers. They are not the same. Section 50 is attracted in case of a search by an officer duly authorised under sec. 42. It is not attracted in search by officers under sec. 41. Question is whether this provision of sec. 50 (1) is attracted in the case of officers carrying out search under sec. 41. The answer is supplied by section 50(3). It will be relevant to state that when an officer is authorised by warrant by magistrate, that officer is authorised by name by the officer after application of mind on arriving at a conclusion that there is a reason to believe that a person has committed an offence punishable under Chapter IV of NDPS Act. After having this reason in mind, the learned magistrate authorises a particular person. So far as authorisation by an empowered officer of a gazetted rank is concerned, he also after having reason to believe the commission of an offence by a person either from a personal knowledge or information given by any person and taken down in writing, authorises his subordinate, who is superior in rank to peon, sepoy or a constable of the concerned department. He authorises such a person knowing full well as to whom he is authorising and also knowing full well whether he will be able to perform his job. Keeping this aspect in mind, if such officers of section 41 are required to give an option to the person to be searched as to whether he would like to be searched in presence of a magistrate or a gazetted officer, then it makes the said powers either of the magistrate or the officer of the gazetted rank to authorise redundant one. Section 50(3) provides that when a person to be searched is brought to a gazetted officer or a magistrate, then such gazetted officer or a magistrate if he sees no reasonable ground for search, shall forthwith discharge the person. If such a gazetted officer or a magistrate agrees that there is a reasonable ground to search, then there is no difficulty, but if he sees no reasonable ground for search and orders to discharge forthwith the person, then it creates not only an unwarranted situation, but an anomalous state of affairs. If an officer who

holds the warrant issued by the magistrate takes a person under sec. 50 (1) to a Gazetted officer or the Magistrate for search and such gazetted officer or Magistrate sees no reasonable ground and discharges such person forthwith, would it not amount to sitting in appeal or review the magistrate's decision that he had reason to believe that such an offence is committed? One Magistrate issues warrant after having reason to believe to have committed an offence and another magistrate or a gazetted officer, who cannot be said to be judicially trained like a Magistrate, simply seeing the person to be searched or hearing the person to be searched or hearing the officer who brought such person to be searched decides that he sees no reasonable ground for search and may discharge forthwith. Can it be said in this situation that the decision of the Magistrate to issue warrant was uncalled for? Can it be allowed by a Gazetted officer or a Magistrate to sit in appeal or a review of the reasons arrived at by the learned Magistrate before issuance of the warrant? Such a situation must have been envisaged by the legislature and despite that, if it has introduced such a provision, it should be read to avoid such embarrassing situation. The legislature is presumed not to create anomalies; nor a provision be read to create an anomaly. Therefore, when the legislature has made section 50 for the officers duly authorised under sec. 42, it cannot be stretched to say that it covers officers under sec. 41 also.

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26. Mr. Keshwani, learned Counsel for the appellants, further contended that there is non-compliance of Sec. 50 of NDPS Act.

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Section 50 refers to search by officer duly authorised under sec. 42 of NDPS Act. As we have discussed earlier, the officers referred to in sec. 41 (2) and sec. 42 (1) are different

officers. It is required to be made clear that for the officers referred to in sec. 41(2), who are carrying out the search, provisions of sec. 50 are not attracted. P.W. 7 himself is a Gazetted officer. When a Gazetted officer is carrying out the search and if a provision requires that he should inquire from the persons to be searched as to whether they would like to be searched in presence of Gazetted officer as contended by Mr. Keshwani, in our opinion is travesty of sec. 50(1). Section 50 (1) contemplates faith in a Gazetted officer or a Magistrate. If inquiring officer himself is a Gazetted officer, can it be said that faith reposed in a Gazetted officer referred to in sec. 50 (1) is taken away. It is improper to say that a Gazetted officer if he is carrying out the search becomes less trustworthy and is required to take the accused person to some other Gazetted officer or a Magistrate. Section 50(1) makes it clear that said provisions are attracted when officer duly authorised under sec. 42 has to inquire from the accused to exercise his option to be searched in presence of a Gazetted officer or a Magistrate. Section 42 (1) makes it clear that the officers duly empowered thereunder are not necessarily Gazetted officers. For the empowered officers referred to in sec. 41(2), provisions of section 50 are not attracted. Reason is that such empowered officers are exercising power of search, seizure under sec. 41(2) itself. No-doubt, under sec. 41(3), they are entitled to exercise powers of search, seizure under sec. 42(1). Therefore, we do not find any substance in the contention raised by Mr. Keshwani that the search carried out by P.W. 7 is in contravention of the provisions of Sec. 50 of the Act.

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All the arguments of Mr. Keshwani that search and seizure is in contravention of Secs. 41, 42, 43 and 50 of the Act are based on the judgment in the case of State of Punjab v. Balbir Singh (AIR 1994 SC 1872). The Supreme Court has observed in that case as under :

"The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to



those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those persons mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to sec. 42(1). To that extent they are mandatory. Consequently, the failure to comply with these requirements thus affects the prosecution case and therefore, vitiates the trial."

By this observations, it is specifically made clear that such of those officers mentioned therein, i.e., in sec. 42(1) are required, on receiving an information, to reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to section 42(1). Supreme Court has not considered whether such of the officers referred to in sec. 41(2) is required to record reasons while acting under sec. 41. As discussed earlier, we are of the opinion that the officers referred to in sec. 41(2) and section 42(1) are different and distinct ones. Officers referred to in sec. 41(2) are superior officers while officers referred to in sec. 42(1) are subordinate officers. Supreme Court had in its mind as to what can be position for non-compliance of the provisions of sections 100 and 165 of the Criminal Procedure Code in case of the officers referred to in sec. 41 of the Act. Supreme Court while considering whether sections 41, 42, and 43 are mandatory or not, has summed up its conclusions and conclusion (4-B), in our opinion, is very relevant for our purpose".

12. It would, therefore, appear that this Court dealing with a similar argument arising from Balbir Singh's case concluded that such officers mentioned in section 50 of the NDPS Act who are not Gazetted Officers would have to comply with the mandatory provision of section 50 of the NDPS Act, but the officers who are

gazetted officers would not have to comply with this provision.

13. Having given our anxious thought to the submission revolving round the compliance of section 50 of the NDPS Act, we are of the opinion that the decision in the case of D.B. Thakur (supra) rendered by the Division Bench of this Court considering Balbir Singh's case (supra) will apply to the facts of the case before us. We would, however, appreciate the efforts of Mr. Budhbhatti in seeing that the proposition which he has sought to canvass is placed in its right perspective. He has for that purpose made a reference to a couple of decisions of the Apex Court.

14. The first one is contained in the case of Raghbir Singh v. State of Haryana reported in 1996 S.C.C. (Cri.) 266. It would be useful to note the observations appearing in paras. 10 and 11 of the citation :-

"10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to severe punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the search to be conducted in the presence of a senior officer. The senior officer may be a Gazetted Officer or a Magistrate, depending upon who is conveniently available.

11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a Gazetted Officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available, Gazetted Officer or Magistrate." (emphasis supplied).

It would therefore, appear that if the officer conducting search is a gazetted officer he is the nearest and

obviously the most conveniently available officer as required under Sec. 50 of the NDPS Act.

15. The next one is in the case of State of Punjab v/s. Labh Singh reported in 1996 S.C.C. (Cri.) 103 where valuable right of the accused conferred u/S. 50 of the NDPS Act was under consideration. The Apex Court has observed that each case should be considered in the light of the facts and circumstances in which the contraband was seized, viz., the time when the search was conducted, the place where it was seized, whether police had prior information of the contraband being in transport or place of concealment, whether there was proper opportunity for the police to secure the presence of a Gazetted Officer, whether the delay in search and seizure would result in the escape of the accused from arrest or contraband would be destroyed or whisked away and a host of all relevant attendant circumstances. Each case depends upon its own factual scenario and no exhaustive or mathematical formula of universal application can be laid down. All that would support the view that if the facts of the case are such as necessarily concern the raiding officer who is a Gazetted Officer, there would be no violation of section 50 of the NDPS Act merely because it is not appearing in the record that the accused was not questioned whether he wanted to be searched or examined in the presence of the Gazetted Officer or a Magistrate. That is exactly what has happened in the present case.

16. The result is that Mr. Budhbhatti's submission that non-compliance of sec. 50 of the NDPS Act as aforesaid would vitiate the trial and consequently the conviction and sentence of the appellant cannot be accepted.

17. No other submission except the submissions which have been noted and dealt with hereinabove has been made against the impugned judgment and order.

In above view of the matter and bearing in mind facts of the present case, the present appeal deserves to be dismissed. Order accordingly.

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\*\*VRP\*\* cr.a.16991j.